ASBOs are dead, long live ASBOs

Sally Ireland discusses the proposed changes for dealing with anti-social behaviour

In July 2010 Theresa May, the new Home Secretary in the Coalition government, announced a review of Anti-Social Behaviour Orders (ASBOs), arguing that under New Labour the sanctions against anti-social behaviour 'were too complex and bureaucratic – there were too many of them, they were too time consuming and expensive and they too often criminalised young people unnecessarily, acting as a conveyor belt to serious crime and prison' (May, 2010). The speech therefore held out a promise of a fundamental reform of ASBOs, one that might address serious criticisms regarding their effectiveness, application to inappropriate groups, due process problems relating to the use of hearsay, and counterproductive effects. This article explores the degree to which the consultation's proposals would achieve genuine change in the system for addressing anti-social behaviour.

The February 2011 Home Office consultation on replacing the ASBO, *More Effective Responses to Anti-Social Behaviour* proposed two new instruments: the 'crime prevention injunction' and the 'criminal behaviour order'. The criminal behaviour order (CBO) would replace the 'post-conviction' ASBO or 'crASBO' issued under section 1C of the *Crime and Disorder Act 1998*. It would differ from the crASBO in that it could be granted on the balance of probabilities and could impose positive requirements in addition to prohibitions (and could therefore look much like a community sentence).

Crime prevention injunctions

This article, however, will focus upon the crime prevention injunction (CPI) available without conviction which, in addition to sharing those features differentiating the CBO from the ASBO (standard of proof and positive requirements), would alter the venue for applications – the injunction would be issued in the county court rather than on complaint in the magistrates' court. The CPI follows the model of 'injunctions to prevent gang-related violence' (IPGV) under the *Policing and Crime Act 2009*. As with any injunction, breach would be a contempt of court but, unlike the ASBO, not a criminal offence. Fines and imprisonment (for up to two years) would, therefore, be available as a sanction for breach but there would be no criminal record. In order to make the injunction workable in the case of children under 18, separate powers of supervision/detention for breach would, it is expected, be created for the CPI, as has been done for the IPGV in the *Crime and Security Act 2010* (although these provisions are not yet in force).

Although in her July 2010 speech Theresa May had said that 'a complete change in emphasis' was needed in relation to anti-social behaviour owing to high breach rates and falling take-up of ASBOs, 'with communities working with the police and other agencies to stop bad behaviour escalating that far', the consultation fails to move beyond the model of using coercive court orders to deal with anti-social behaviour. Indeed, since CPIs are intended to be easier to obtain than ASBOs and can impose a wider range of obligations on an individual, implementing the consultation's proposals might increase reliance upon such orders. Further, if the Police and Crime Commissioners (PCCs) proposed in the *Police Reform and Social Responsibility Bill* are created, there may be considerable pressure on chief constables to use them – since anti-social behaviour is likely to be a key issue in PCC elections.

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Move to the county courts

It is questionable whether the move from the magistrates' court to the county court will in itself make a great deal of difference either to recipients of orders or communities. The academics Simon Hoffman and Stuart Macdonald have argued for this change on the basis that 'magistrates pay insufficient regard to the statutory test of necessity when deciding whether to make an order' and that 'prohibitions contained in ASBOs made by magistrates are often formulaic and poorly targeted' (Hoffman and Macdonald, 2010). However, the latter failing of ASBOs is in large part due to the orders being granted wholly or largely in the form in which they have been drafted by applicants. Since it is likely that applicant local authorities and police forces would continue to draft CPIs, the county court would have to be relied upon to take a restrictive approach, removing overbroad prohibitions and requirements where appropriate. However, in *Birmingham City Council v Flatt* [2008] EWCA Civ 739, for example, the type of 'catch-all' prohibition criticised in relation to ASBOs in cases such as *Heron v Plymouth City Council* [2009] EWHC 3562 (Admin) was included in a county court anti-social behaviour injunction under the *Housing Act 1996*. The appellant was prohibited from 'acting in a manner capable of causing nuisance or annoyance towards anyone living or visiting' a certain street.

Standard of proof

More likely to affect the system is the change to the proposed standard

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of proof. Under the consultation's proposals, the relevant past anti-social behaviour for a CPI – the same as that necessary for an ASBO, and not necessarily 'crime' at all – would have to be proved to the civil standard, on the balance of probabilities. In the well-known case of *McCann* (*R v Manchester Crown Court, Ex p McCann and others*, [2002] UKHL 39), in the face of statutory silence in the *Crime and Disorder Act 1998* on the question of the standard of proof, the House of Lords read in the requirement that, as a matter of pragmatism, anti-social behaviour founding an ASBO application should be proved to the criminal standard – that is, beyond reasonable doubt. However, if legislation specified that, for CPIs, the standard was to be the balance of probabilities, the courts would be unlikely to issue a declaration of incompatibility under the *Human Rights Act 1998*, meaning that the civil standard would apply. The requirement to prove past behaviour to the criminal standard is a high hurdle; its removal will, it is suggested, mean that CPIs will be easier to obtain on limited evidence from professional witnesses, e.g. police officers.

Prohibitions or positive requirements?

The consultation paper proposes that CPIs and CBOs could impose positive requirements upon defendants, but gives little information about what type of obligations these might include. The examples it gives are:

> *if a perpetrator regularly causes ASB in a certain area, he could be prohibited from returning to it and required to undertake an anger management course, or if a dog owner was persistently demonstrating a lack of control of an aggressive dog he could be prohibited from walking the dog in certain areas and/or required to always keep his dog on a lead and/or muzzled in public including in his garden or in places of common access. (Home Office, 2011)*

Two sorts of positive requirements are envisaged here: attendance at programmes and other obligations requiring provision by a public authority of services, and others imposing obligations only upon the defendant. However, it is unclear how much the first type of requirement would be available to courts imposing CPIs. The consultation expressly provides, in relation to CBOs, that the prosecutor would 'need to be able to satisfy the court that a relevant authority was in a position to satisfy or discharge any positive requirements'. Presumably the same principle would apply to CPIs: in many cases the local authority applicant would itself be the provider of the relevant programmes. In the context of current funding cuts, however, it is doubtful how many such requirements courts will be able to include in CPIs, or indeed how many would be applied for including such requirements. In relation to adults, probation trusts are the main provider of programmes of this kind; local authority provision for adults is very limited. However, probation will not be involved in applying for CPIs. Further, experience with community sentences in the criminal courts has shown that many programmes theoretically available to sentencers are not imposed in large numbers, possibly in part because of lack of local provision (Mair et al., 2008). Two of the most commonly imposed community order requirements – unpaid work and probation supervision – would not be appropriate for CPIs.

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It is therefore likely that CPIs will tend to contain prohibitions and that most positive requirements imposed will create obligations only for the defendant. Since most such obligations can be rephrased as prohibitions in any event (for example, the consultation paper's example could have been written as a prohibition upon having a dog in a public place without a muzzle) it is questionable therefore how much the content of CPIs will differ from that of ASBOs.

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It is probable that the creation of CPIs in place of ASBOs will make little difference to the recipients of the orders or to the communities they aim to protect. Nor will the majority of the criticisms of ASBOs be addressed by CPIs. In moving applications to the county courts, the government is simply making it easier to justify a civil standard of proof and therefore hoping to make applications faster, cheaper and more likely to succeed. ■

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References

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